Supreme Court, U. S.
FILED
MAY 12 1978
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-1390

**ALTON BOX BOARD COMPANY, et al., and RICHARD ELDH,**
*Petitioners,*

vs.

**UNITED STATES OF AMERICA,**
*Respondent.*

**In Re Folding Carton Antitrust Litigation**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## PETITIONERS' REPLY BRIEF

RICHARD A. MAKARSKI
MARK P. COHEN
RICHARD G. SMOLEV
Suite 1600
111 West Monroe Street
Chicago, Illinois 60603
*Counsel for All Corporate Petitioners*

MATTHIAS A. LYDON
Suite 2120
120 South LaSalle Street
Chicago, Illinois 60603
*Counsel for Petitioner Richard Eldh*

*Of Counsel:*
CHAPMAN AND CUTLER
Suite 1600
111 West Monroe Street
Chicago, Illinois 60603

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

# In the
# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-1390

**ALTON BOX BOARD COMPANY, et al., and RICHARD ELDH,**
*Petitioners,*

vs.

**UNITED STATES OF AMERICA,**
*Respondent.*

**In Re Folding Carton Antitrust Litigation**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## PETITIONERS' REPLY BRIEF

The chart of the Plaintiffs-Respondents found on pages 4 through 7 of their Brief in Opposition which purports to catalog the extent of the disclosure of grand jury testimony during the preceding criminal antitrust action is misleading. By listing the individual defendants in the criminal antitrust action beneath their corporate employer, the Respondents in their chart seek to convey the impression that there was extensive disclosure of grand jury testimony to the corporate criminal antitrust defendants, corporate Petitioners here, including disclosure of grand jury testimony to the witness' corporate employer.

Respondents, however, cannot so easily rewrite the record, and Petitioners' statements on pages 8 and 15 of their Petition for a Writ of Certiorari that no transcripts of any grand jury witness were or have been disclosed to the present corporate employer of that witness is completely correct. Each and every individual listed on the Respondents' chart was an individual defendant in the criminal antitrust action, and was represented by his own counsel, who was separate and distinct from the counsel representing the corporate defendants. With the exception of individual defendants Ernest J. Curtis, George F. Wohlgemuth, Fred L. Bohlke, Vern Kepford and Melvin E. Riecke, who examined portions of the grand jury transcripts of some witnesses, the disclosure of grand jury material to the remaining individual defendants occurred only during review by the individual defendant's counsel of the statement in aggravation pertaining to that particular defendant. Consequently, the disclosure that did occur was to the counsel for the individual defendants, and not to the corporate employer of the individual defendants or to the corporate employers of the grand jury witnesses.

To illustrate the misleading nature of Respondents' chart, on pages 4 and 5 the chart appears to indicate that American Can Company reviewed the grand jury transcripts of grand jury witness Stuberg and grand jury witness Petitioner Eldh. In fact, however, no officer of American Can Company has ever seen the grand jury testimony of Stuberg and Eldh, and it was only the counsel for individual defendant Donald H. Wedin who saw any excerpts of grand jury testimony as they appeared in the statement in aggravation relating to defendant Wedin.

Moreover, the record below discloses through the Affidavit of Henry P. Sailer, one of the counsel for American



Can Company in the civil action, that no information regarding the grand jury proceedings has been or will be disclosed to American Can Company or to him or other trial counsel for American Can Company. *See* Volume II of the Appendix as contained in the Certified Record at pages 516-517. To suggest, as the Respondents do in their chart, that disclosure of the testimony of a grand jury witness as contained in a statement in aggravation to the attorney for an individual defendant constitutes disclosure to that witness' corporate employer is unsupportable in law and in fact.

The Respondents' chart is further misleading in that it suggests that there was disclosure of grand jury material to Gulf States Paper Corporation, which was not one of the defendants in the criminal action, but is one of the defendants in the subsequent civil antitrust action. *See* the footnote on page 6 of the Petition for Writ of Certiorari. The only possible basis for this conclusion is that disclosure to Messrs. John L. Conlon and Mark Crane, counsel for individual defendant Vern Kepford in the criminal action, constitutes disclosure to Gulf States in the civil action, where Messrs. Conlon and Crane are acting as counsel for that company. Not only is there no basis in law for such an assumption, but the record below affirmatively discloses through the Affidavit of John L. Conlon that no disclosure relating to the grand jury proceedings has been or will be disclosed to Gulf States Paper Corporation. *See* Volume II of the Appendix contained in the Certified Record at pages 618-620. The record therefore refutes the Respondents' allegations found on page 13 of their Brief in Opposition that "grand jury testimony [is] freely available in the offices of counsel for the corporations and their managing employees. . . ."

Accordingly, what the Respondents attempt to portray as widespread disclosure of grand jury testimony to the corporate Petitioners here did not occur. No defendant corporate employer in the criminal or civil antitrust actions saw the grand jury testimony of any of its present corporate employees, and in fact, with the exception of Weyerhauser, Consolidated Packaging Corporation, and Champion International, no defendant corporation saw any grand jury testimony whatsoever. Nonetheless, the Courts below ordered disclosure of grand jury testimony even though the record demonstrates that a major policy reason to preserve grand jury secrecy still exists — to protect employees from retaliation by their employers and others in the industry and to thus assure that future grand jury witnesses will testify freely.

This Petition for Writ of Certiorari therefore presents a conflict between the Fifth and Seventh Circuits relating to the disclosure of grand jury testimony, and further presents important and recurring questions concerning the effective functioning of future grand juries which have not been presented in any petition for writ of certiorari previously filed with the Court, and which this Court should resolve.

Respectfully submitted,

RICHARD A. MAKARSKI
MARK P. COHEN
RICHARD G. SMOLEV
Suite 1600
111 West Monroe Street
Chicago, Illinois 60603
*Counsel for all Corporate Petitioners*

MATTHIAS A. LYDON
Suite 2120
120 South LaSalle Street
Chicago, Illinois 60603
***Counsel for Petitioner Richard Eldh***



*Of Counsel:*

ALTHEIMER & GRAY
One IBM Plaza, Suite 3700
Chicago, Illinois 60611
HOAGLAND, MAUCKER, BERNARD
& ALMETER
401 Alton Street
Alton, Illinois 62002

*For: Alton Box Board Company*

CHAPMAN AND CUTLER
111 West Monroe Street
Chicago, Illinois 60603

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

*For: American Can Company*

SIDLEY & AUSTIN
One First National Plaza
Suite 4800
Chicago, Illinois 60603

*For: Brown Company*

LORD, BISSELL & BROOK
115 South LaSalle Street
Suite 3500
Chicago, Illinois 60603

MORRISON, HECKER, CURTIS,
KUDER & PARRISH
1700 Bryant Building
Kansas City, Missouri 64106

*For: Burd & Fletcher Company*

*Of Counsel:*

JENNER & BLOCK
One IBM Plaza, 44th Floor
Chicago, Illinois 60611

*For: Champion International Corporation*

ROSS, HARDIES, O'KEEFE,
BABCOCK & PARSONS
One IBM Plaza, Suite 3100
Chicago, Illinois 60611

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

*For: F. N. Burt Company, Inc.*

ANTONOW & FINK
111 East Wacker Drive
Suite 3000
Chicago, Illinois 60601

*For: Consolidated Packaging Corporation*

CHADWELL, KAYSER, RUGGLES,
McGEE & HASTINGS
8500 Sears Tower
Chicago, Illinois 60606

ROBERT H. CANNON, ESQ.
One First National Plaza
54th Floor
Chicago, Illinois 60670

*For: Container Corporation of America*



*Of Counsel:*

FRIEDMAN & KOVEN
208 South LaSalle Street
Suite 1130
Chicago, Illinois 60604

SHEA, GOULD, CLIMENKO, KRAMER
& CASEY
330 Madison Avenue
New York, New York 10017

*For: Diamond International Corporation*

KECK, CUSHMAN, MAHIN & CATE
8300 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

*For: Eastex Packaging, Inc.*

SCHIFF, HARDIN & WAITE
7200 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

WHITE & CASE
14 Wall Street
New York, New York 10005

*For: Federal Paper Board Company, Inc.*

CONCANNON, DILLON, SNOOK &
MORTON
111 West Washington Street
Suite 823
Chicago, Illinois 60602

BROBECK, PHLEGER & HARRISON
One Market Plaza
Spear Street Tower
San Francisco, California 94105

*For: Fibreboard Corporation*

*Of Counsel:*

JENNER & BLOCK
One IBM Plaza
44th Floor
Chicago, Illinois 60611

DEBEVOISE, PLIMPTON, LYONS
& GATES
299 Park Avenue
New York, New York 10017

*For: The A. L. Garber Company, Inc.*

JENNER & BLOCK
One IBM Plaza, 44th Floor
Chicago, Illinois 60611

WHYTE & HIRSCHBOECK, S.C.
2100 Marine Plaza
Milwaukee, Wisconsin 53202

*For: Hoerner Waldorf Corporation*

MAYER, BROWN & PLATT
231 South LaSalle Street
19th Floor
Chicago, Illinois 60604

DAVIS, POLK & WARDELL
One Chase Manhattan Plaza
New York, New York, 10005

BYRON E. KABOT, ESQ.
220 East 42nd Street
Suite 2905
New York, New York 10017

*For: International Paper Company*



*Of Counsel:*

D'ANCONA, PFLAUM, WYATT & RISKIND
30 North LaSalle Street
Suite 3100
Chicago, Illinois 60603

TAFT, STETTINIUS & HOLLISTER
600 Dixie Terminal Building
Cincinnati, Ohio 45202

*For: Interstate Folding Box Company*

ISHAM, LINCOLN & BEALE
One First National Plaza
42nd Floor
Chicago, Illinois 60603

HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Suite 900
Washington, D. C. 20006

*For: The Mead Corporation*

KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601

*For: Packaging Corporation of America*

MCBRIDE, BAKER, WIENKE & SCHLOSSER
110 North Wacker Drive
Suite 500
Chicago, Illinois 60606

PILLSBURY, MADISON & SUTRO
Standard Oil Building
225 Bush Street
San Francisco, California 94104

*For: Potlatch Corporation*

*Of Counsel:*

WILDMAN, HARROLD, ALLEN & DIXON
One IBM Plaza, Suite 3000
Chicago, Illinois 60611

SHEARMAN & STERLING
53 Wall Street
New York, New York 10005

*For: Rexham Corporation*

CROWLEY & GOSCHI
135 South LaSalle Street
Suite 758
Chicago, Illinois 60603

LEBOEUF, LAMB, LEIBY & MACRAE
140 Broadway
New York, New York 10005

*For: St. Regis Paper Company*

KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601

*For: Weyerhaeuser Company*